THE CAPTURE OF CONTRABAND OF WAR

BY E. S. ROSCOE

In a recent number of this Review I endeavoured to place before its readers a short exposition of the Evolution of Commercial Blockade; a kindred and important subject is the Capture of Contraband of War. The two, especially if considered together, stand out as by far the most important subjects which have engaged the attention of the Judges of the Allied Prize Courts during the Great War, and in the case of each there has been an unmistakable and definite movement. It may be that after the conclusion of the present War the world will not again be disturbed by international hostilities. It would, however, be impractical to rely on such a desirable contingency, and, if the possibility of future wars is not to be overlooked, the experience of the present great conflict should not, in relation to such subjects as the Capture of Contraband, be disregarded.

The question of contraband has from the earliest times been a constant cause of disagreement between belligerents and neutrals: their interests have always been sharply antagonistic, and both belligerent and neutral has based his claim on so-called rights, while additional bitterness has been added to the inevitable disputes because the belligerent has regarded the neutral as endeavouring to prevent the success of his operations, and the neutral has, although not a party to existing hostilities, smarted under pecuniary loss.

Nothing has been more unprofitable than the attempts of jurists to construct in regard to articles which may or may not be declared contraband some kind of theory of rights from the fluctuating action, whether in treaties, proclamations or decisions of prize courts, of various European Powers. "The view of contraband," wrote the late Profes-

sor Westlake, "which found one of its earliest expressions in the Treaty of Whitehall may, from the state most eminent among its authors and upholders be called the British." (*War,* page 283). The so-called British view was the assertion of the practice of preventing the entry into a belligerent country of a larger number of articles than was approved by France. These practices were not based on any theory, on the contrary they rested on mere military convenience, for the larger the number of articles which could be prevented from entering a belligerent port by the maritime power of Great Britain, the greater was the injury inflicted on the antagonistic belligerent Power. From beginning to end the practice of nations in regard to the inclusion of certain articles under the term contraband has depended on the needs and views of the several combatants. "So far as they were not bound by a treaty," writes Professor Oppenheim (*International Law,* II., p. 481), "belligerents formally exercised their discretion in every war according to the special circumstances and conditions for regarding or not regarding certain articles of ancipitous use as contraband." The Great War at any rate has made it clear that freedom of practice in regard to the number of contraband articles must henceforth prevail, for in this way only can the military necessity of the belligerents at a given time have complete expression.

It may be—as has been suggested—that a time is approaching when wars will no longer disturb the tranquil current of life, but, if they come and maritime nations are again involved, the capture of contraband articles by a belligerent will be more than ever destructive of neutral trade. A modern war is a vast engineering and commercial operation, the culmination of which is the destruction by armed forces of human life and property. Consequently the number of articles which can fairly be regarded as useful to a belligerent is now so large that a list of absolute and conditional contraband goods includes almost everything which is the subject of commercial transactions. If, for example, one turns to the second edition of the clear and useful manual compiled by Mr. Maurice Rackham of the British Admiralty and Prize Registry, there were, to November 5th, 1915, two hundred and ninety-nine articles classed as absolute contraband, and seventy-eight as conditional contraband, numbers which have since been considerably increased. Many sepa-

rate headings form a class of articles, each necessarily therefore including any number of separate articles. No. 14, for example, of the conditional contraband goods is "Fabrics for clothing if suitable for war." Some similar articles are to be found enumerated, for ease of reference, under different heads but this does not lessen the cumulative effect of the character of modern warfare as exemplified by the list of contraband.

In the Declaration of London its authors, with what now seems remarkable optimism, placed a list of seventeen articles which might not be declared contraband (Article 28) including, surprising as it may seem, cotton and rubber, whilst eleven classes only were declared to be absolute contraband and fourteen conditional contraband (Articles 22 and 24). The latter, however, were under a formidable limitation, because, in order to be condemned, they must be shown to be destined for the use of the armed forces of the enemy and not intended to be discharged in a neutral port. The present war has put an end to any such limitation and has established the propriety of the condemnation by a Prize Court of articles as conditional contraband, if their ultimate destination is a place in belligerent territory, even though the end of the actual voyage may be a neutral port. This action rests upon what in legal language is termed the doctrine of continuous transit, which was first enunciated by Lord Stowell in the Napoleonic War in relation to the enemy's Colonial trade and was extended to contraband by the Supreme Court of the United States in the American Civil War. The doctrine has now been distinctly included in English Prize Law. "It appears also to be obvious," said Sir Samuel Evans, the President of the British Prize Court, "that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all it must cover not only voyages from port to port at sea, but also transport by land, until the real as distinguished from the merely ostensible destination of the goods is reached." And the practice must be considered now, both as regards sea and land transit, as an admitted rule of international law.

The value of precedent in British and American jurisprudence is so marked that the authority of Lord Stowell was willingly relied on by the American Courts to support their judgments on this point, just as in the present war the British Prize Court has relied on these very decisions of the

Supreme Court of the United States. But, the doctrine, if such it may be called—apart from any question of inclusion in judicial precedents whether British or American—is a natural evolution of a practical kind arising out of modern mercantile conditions and must, legal precedent or no legal precedent, have inevitably come into existence unless the stoppage of contraband was to be limited by a practice unsuitable to present day affairs and was to be of no real value to a belligerent. The differences of jurists have become immaterial in face of overwhelming facts: "Although the majority of Continental writers condemn the doctrine of continuous transport, several eminent Continental writers support it" (Oppenheim, II., p. 504). This comment is suggestive, because it shows that some writers on international usage have been led astray. They have endeavoured to find juristic bases for or against practices which have come into existence from the changes produced by time or modern conditions. International law needs to be more studied in relation to national development rather than as an exact science. Some writers have, for example, condemned the so-called doctrine of continuous transit on the ground that goods in a neutral country, whatever their character, may be dealt in and forwarded to a belligerent and therefore that a contraband cargo, once it has arrived in neutral territory, enters, as it were, into a new commercial existence and should not be regarded as property in the course of transit. Such an argument ignores the real course of circumstances in modern commercial practice. It is in fact an ingenious but wrong method of reasoning because, as already suggested, this question must be regarded in relation to the actual facts of commercial international intercourse.

The elaborate extension of the list of contraband articles not only by Great Britain but also by her Allies, has clearly shown that no finite lists of contraband, whether absolute or conditional, can be arranged by international agreement in periods of peace. For the changes produced by time on warfare cannot be foreseen in their completeness, nor can the locality of warfare or the conditions of combatants be known before hostilities. It is a gain, at any rate, that recent experience has proved definitely that each combatant must be at liberty to compile lists of contraband at the beginning of or during the continuance of hostilities, and, however hard it may be for neutrals, they must put up with loss

and inconvenience caused by the consequent more widespread interference with their trade. It is another instance that modern warfare between armed nations, and not merely between armies, is a catastrophic event, infinitely more disturbing not only to combatants but to neutrals than were wars in the past however apparently important. But it is the combination of the doctrine of continuous transit by sea or overland with the varied and complicated character of modern warfare, requiring as it does most of the articles of civil life for the use of military operations, that has chiefly given to the capture of contraband such exceeding importance both to neutrals and to belligerents. In the time of our forefathers blockades were operations which were most depended on. But blockades of enemy ports and even of an enemy country by means of the stoppage of non-contraband goods to neutral ports, can never have the same military value or at any rate can have in many instances only comparatively little effect without the assistance of the capture of contraband goods—whether to be delivered out of ships at a belligerent or a neutral port. If, however, it is clear that international pacts cannot and ought not to limit the number of articles which a belligerent may declare to be contraband, it would yet be possible to regulate by international agreement the effect of the carriage of contraband on neutral ships. The result to a neutral shipowner of the carriage of contraband is not vital to the interests of a belligerent, who is safeguarded if he can capture certain articles and secure their condemnation by his Prize Court. But a clear and settled international practice as to these results is of the first importance to neutral shipping and it should be possible for nations to agree on some international rules which could be placed in a statute in each country of the world in the same way as certain international agreements on the subject of collisions and salvage, which gave effect to two conventions approved and signed at Brussels in 1910, were embodied—for example—in the British Maritime Conventions Act 1911. According to Article 40 of the Declaration of London, if more than half the cargo in value, weight, volume or freight is contraband the vessel is subject to condemnation. This rule is plainly absurd, for it has no sound theoretical basis. It is also practically foolish, for a vessel, having less than half of the cargo contraband, may in that lesser quantity carry some articles more valuable to the enemy than are contained

in a cargo which is more than half of the contents of the vessel's holds or more than half the value. From the theoretical point of view a ship by carrying contraband either does so much injury to a belligerent, that in order to prevent the carriage she should be liable to be condemned by a Prize Court, or else her action is so innocent that she should be restored to her owners. A difference in what may be called guilt appears to exist between a ship which carries contraband to a belligerent port and one which is bound for a neutral port, since it may be fairly argued that, in the former case there is a presumption of guilt, in the latter of innocence. Hardly less important to neutral shipowners is a universal international agreement as to whether or not, assuming there are cases in which a vessel though she has carried contraband articles which have been condemned, should not be confiscated, is or is not entitled to be paid freight on the captured articles. These points, important though they are to shipowners, do not—as has been stated above—affect the vital part of the subject of contraband, namely the right —and it may almost now be so called—of a belligerent to capture contraband articles in the course of a continuous transit, and the freedom of a belligerent to declare articles absolute or conditional contraband if he considers that they are of utility to the military projects of the enemy.

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